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No. 83-1180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LIANE BUIX McDONALD,
on her own behalf and on behalf
of all others similarly situated,

Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

BRIEF OF ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

When the Courts below determined, based on a detailed evidentiary record, that an award of full retroactive seniority in a Title VII case would have caused unusual adverse impact of unprecedented dimension to incumbent employees, did such Courts abuse their discretion by granting all class members reinstatement with partial retroactive seniority for competitive purposes, full retroactive seniority for compensation and benefits, and other special relief?

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BRIEF OF ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

A. The original underlying action, *Romasanta* v. *United Airlines, Inc.*, was directed at a "no-marriage" rule maintained by United Air Lines ("United") which previously had been eliminated and declared illegal under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* 2a-3a.[1] After class action status was denied and the claims of all individual plaintiffs settled or dismissed, Order, October 3, 1975, Liane McDonald, a putative class member, intervened to pursue the litigation. *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977).

[1] Citations of Opinions and Orders of the Courts below are to pertinent pages in Petitioner's Appendix.

In late 1979, the District Court began to consider class-wide remedies, and only then "did the gargantuan proportions of this case become established." 43a. A class believed to number at most 140, *Romasanta* v. *United Airlines, Inc.*, 537 F.2d 915, 917 and n.2 (7th Cir. 1976), mushroomed to nearly 1800, with an "unprecedented" number (at least 1400) seeking reinstatement with full retroactive seniority to positions held on average for but 1⅓ years, AFA Ex. 17, and not since 1965-1968. 43a, 87a; 9a-12a.

After the Association of Flight Attendants ("AFA") intervened to represent the incumbent flight attendants, 4a, a three week evidentiary hearing was held to determine whether reinstatement of the class with full retroactive seniority could be equitably awarded without causing "unusual adverse impact." *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 779 n.41 (1976) ("*Franks*"); 4a; 40a-41a. In the midst of trial, McDonald proposed that reinstatements be on a so-called "openings" basis, conditioned on: return of all claimants within two and one-half to three years before any furloughed incumbents, or "she would 'undoubtedly . . . petition the court to modify the decree,' " 23a; 56a; "front pay" (full pay and benefits until reinstated); and actions by United to create openings, requiring changes in the collective bargaining agreement. 23a-24a; 49a-56a. The Court found the proposed timetable unworkable and other conditions impermissible. 48a-60a; 23a-27a.

The District Court recognized that under *Franks* and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) ("*Teamsters*"), retroactive seniority is presumptively warranted, but may be denied if it would result in "unusual adverse impact." 44a-45a, 48a. The Court carefully considered the all-pervasive significance of seniority to the flight attendant position, 62a-64a; 5a-7a, and each area of adverse impact which would be caused by reinstatement with full seniority of a class whose enormous size and seniority relative to the incumbent work force

were unprecedented. 66a. On the basis of the evidence, the Court concluded that reinstatement of claimants with full retroactive seniority, whether at once or as openings arose, would cause unprecedented "unusual adverse impact" of "such grave proportions," 87a (including immediate and long-term loss of jobs and vital working conditions by thousands of incumbents), "that to ignore [it] would be a clear abuse of the Court's equitable discretion." *Id.*

The Court fashioned a remedy which "enable[s] the claimants to return to their jobs with the most favorable package of employment benefits which does not otherwise cause an unduly adverse impact" upon incumbents. 90a. It awarded class members full retroactive seniority for compensation and other significant benefits, 88a, 95a, placing each in the top pay bracket, 63a (at least $28,000 per year), with 30-37 days annual paid vacation, AFA Ex. 1, §18, and unlimited passes; other special relief, 88a n.32, 89a, 96a, 97a; and retroactive competitive seniority equal to seniority accrued by claimants prior to termination. 88a, 95a.

McDonald's motion to reconsider, seeking different relief (restoration of the "relative seniority" claimants held when terminated), was denied because its impact would be nearly as drastic as full retroactive seniority. 27a-30a and n.10.

B. The Court of Appeals affirmed in all respects. It held that the trial court had proceeded properly under *Franks* and *Teamsters,* in evaluating the many facets of impact upon incumbents of an award of full retroactive seniority, 12a-20a, and found ample support for the findings of "unusual adverse impact," regardless of whether reinstatements were immediate or by openings, 21a-27a, or with "relative" rather than full seniority. 27a-30a and n.10. The Court affirmed the award of full retroactive seniority for certain purposes and of partial retroactive seniority for others, as providing, consistent with *Franks,*

"the fullest possible relief for the class" that would not result in unusual adverse impact to incumbents. 32a, 36a-38a.[2] McDonald's Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied. 101a-102a.[3]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The decisions of the Courts below are fully consistent with the opinions of this Court and Title VII. They do not merit Supreme Court review.

This Court has not required district courts to ignore the facts presented and rotely adopt pre-ordained seniority remedies, as McDonald contends. Petition for Certiorari ("Pet."), pp. 7-10. *Franks* holds that an award of retroactive seniority, while presumptively warranted, is specifically not "requisite in all circumstances." 424 U.S. at 770.

> "[T]he statutory scheme of Title VII implicitly recognizes that there may be some cases calling for one remedy but not another. . . . Circumstances peculiar to the individual case may, of course, justify the modification or withholding of seniority relief for reasons that would not if applied generally undermine the purposes of Title VII." *Id.* at 779.

Retroactive seniority may be denied, in whole or in part, "on the basis of unusual adverse impact arising from facts

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[2] The Court also rejected a challenge by a single claimant, Joyce Barr, first raised after the District Court's decision, to evaluation of impact on the basis of 1,400 class members, and before completion of all individual entitlement trials. 9a-12a. McDonald now echoes Barr's challenge to the "1400" number, Pet., p. 6 n.3, but that "is the number upon which the AFA, United and McDonald agreed at pretrial conferences," 10a; 65a-66a n.16, and the record confirms its reasonableness. 11a-12a. Barr's renewed challenge following the appellate court's ruling, based on allegedly new facts, was rejected as "not well taken," Order, November 18, 1983; the experience in the entitlement hearings (approximately 75% favorable to claimants) has confirmed the validity of the "1400" number.

[3] We assume petitioner intended to invoke this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

and circumstances that would not be generally found in Title VII cases." *Id.* at 779 n.41. *Cf. Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 225-26 (1982) (back pay not mandatory under Title VII).

Teamsters confirms that retroactive seniority relief is not automatic. 431 U.S. at 365. In "devising and implementing remedies under Title VII," *id.* at 375, the district court has the "delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing," *id.* at 372, and must strike an "equitable balance" between the two. *Id.* at 376. The trial judge should " 'look to practical realities' " such as "the number of victims, the number of non-victim employees affected and the alternatives available to them, and the economic circumstances of the industry," in arriving at the " 'special blend of what is necessary, what is fair, and what is workable.' " *Id.* at 375 and 376 n.62 (*quoting Lemon* v. *Kurtzman*, 411 U.S. 192, 200, 201 (1973)). This requires the district court to focus on the particular circumstances presented. *Cf. Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 400-01 (1982) (with "impact" issue removed, Court declined to pass on whether award of retroactive seniority was appropriate "on the facts of this case").

McDonald's contention that the only "accommodation" available to incumbents is protection against "bumping," Pet., p. 9, rests on the same faulty assumption that full retroactive seniority must accompany reinstatement. As the Court below observed, this position "find[s] little support in *Franks*, the appellate decisions of . . . courts that have applied *Franks*, or the Supreme Court disposition in [*Teamsters*]." 14a.

II. The decisions below, applying *Franks* and *Teamsters*, are grounded on the unique facts of this case, which demonstrated extraordinary impact of unprecedented dimension. They do not merit Supreme Court review.

A. The District Court took as its starting point the *Franks* presumption of full seniority, and required United and AFA to demonstrate "unusual adverse impact." 31a; 48a. It carefully analyzed "the many different kinds of impact a grant of full, retroactive seniority would have" on incumbent flight attendants, 17a and 19a n.8, and concluded that full retroactive seniority would cause unusual adverse impact to incumbents "of a magnitude without precedent" in Title VII litigation. 87a.

The detailed record *in this case*—which McDonald ignores—amply supports the Courts' conclusions. Seniority, while generally important, is "singularly significant" to the United flight attendant position. 62a-64a; 5a-7a. Reinstatement with full retroactive seniority, whether immediate or by openings, of a class whose "size and seniority . . . relative to the incumbent work force is without precedent in any reported Title VII litigation," 66a,[4] would not merely diminish incumbents' expectations, Pet., p. 8, but inflict massive loss of presently held jobs and working conditions.

At least 1400 incumbents would be furloughed (laid off), suffering immediate, and likely permanent, job loss. 67a-68a and n.19; 21a. Other consequences would be "nearly as drastic." 69a. More than 500 incumbents would be involuntarily dislocated from their domiciles—the base for jobs and personal lives—forced either to uproot themselves and their families, or to endure the immense difficulties of commuting to distant domiciles. 69a-73a and n.20;

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[4] The class is as large as nearly 20% of the incumbent work force. 65a. If granted full retroactive seniority, the class' median seniority would exceed that of 88% of incumbents, and all would be in the top third of the seniority list. 66a.

21a-22a. Many would have no choice but to resign. 71a-72a and n.21; 22a. Thousands (nearly ⅓) would be displaced from lineholder to reserve status, 75a, a demotion tantamount to "a sentence to peonage massively affecting their lives and careers." 78a.[5] Work schedules would be significantly downgraded, 78a-81a; the enormous financial cost to United would "immediately impact" incumbents, 81a-83a; and the minority flight attendant population would be seriously reduced. 83a-84a; 22a-23a. These consequences would fall on innocent incumbents whose extensive efforts, not claimants', Pet., pp. 13-14, are responsible for the total transformation of the job from the "marginally attractive" position claimants left. 60a-62a, 86a.

In light of this drastic impact, full retroactive seniority could not be equitably awarded:

> "the adverse impact of reinstatement of 1400 claimants . . . is of a magnitude without precedent. The consequences . . . are of such grave proportions that to ignore them would be a clear abuse of the court's equitable discretion. To the extent that relief awarded under Title VII may result in an 'unusual adverse impact' in any circumstances, it does so here." 87a.

Delaying reinstatements until openings arose would "resolve the equitable dilemna only minimally," *id.*, because all claimants would return to the top of the seniority ranks, causing a massive decline in incumbents' seniority positions, with consequent loss of presently held jobs and working conditions. 66a, 77a-78a. "The impact would still be unduly adverse." 87a. After reviewing the record, the Court of Appeals fully affirmed. 21a-27a, 30a, 39a.

Having reached these findings and conclusions, the District Court considered "the full 'gamut' of possible senior-

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[5] The lineholder/reserve distinction is "the most fundamental that can be drawn among the flight attendant work force." 64a. A lineholder knows where and when she will fly before the month begins, whereas reserves' "lines of flying are determined by the airline, at its option, and according to its needs." 6a-7a; 73a-74a.

ity remedies," 27a-28a n.10, and applied its "keen[] appreciation of the peculiar facts and circumstances," *Franks*, 424 U.S. at 780, *quoting Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421-22 (1975), to forge a remedy which would provide claimants "the maximum measure that would not result in 'unusual adverse impact.'" 37a. It granted claimants full retroactive seniority for compensation and other key benefits, (*e.g.* vacations, passes), 88a, 95a; exempted all claimants from monthly reserve status, 88a n.32, 97a, forcing over one thousand incumbents to serve reserve who otherwise would not; and permitted claimants to await return to preferred domiciles. 89a, 96a. Subsequently, claimants were granted full retroactive seniority to select initial domicile assignments. Orders, September 16 and 23, 1983. To eliminate unusual adverse impact, the Court granted claimants retroactive seniority for competitive purposes equal to the time spent at United as flight attendants. 88a, 95a.

This remedy reflects "the sound equitable discretion of the trial court," *Teamsters*, 431 U.S. at 376, *see Franks*, 424 U.S. at 770, in striking "a careful balancing of rights and consequences" in this "extremely complicated case," 38a, "that has already been unresolved too long." 11a.

B. McDonald's misguided attack on the "approach" of the Courts below ignores the evidentiary foundation for their decisions, and provides no grounds for review by this Court.

First, the District Court did not abdicate its responsibilities or "consider[] its function performed when it rejected the [openings] proposals as tendered by the discriminatees," Pet., p. 12, in light of their impossible or impermissible conditions. 48a-60a; 23a-27a. Rather, it concluded, with ample evidentiary support, that incumbents would suffer nearly as extensive unusual adverse impact if claimants were returned to openings, even if workable, as if reinstated immediately. 68a-69a, 72a-73a, 76a-78a; 23a-27a.

Second, despite the alleged "overweening emphasis" on United's economic condition, Pet., p. 15—a factor properly considered under *Teamsters*, 431 U.S. at 376 n.62[6] —the Court awarded full retroactive seniority for all purposes which directly impact United, the only adjudged wrongdoer, costing $10 million initially and $21 million annually, 82a; 31a, *see* 36a-37a, in addition to a potential back pay liability whose magnitude has caused United's accountants to qualify its financial statements. Pl. Ex. 47.

Third, the Courts below neither ignored the impact to claimants, Pet., pp. 10, 14, nor displayed an "egregious disregard or noncomprehension of the purposes of civil rights legislation," Pet., p. 13, in declining to restore claimants' original seniority or the "relative seniority" obtained in months in the 1960s but which would take years to achieve in today's dramatically improved flight attendant position. 28a. The impact of "relative seniority" relief would be only minimally less devasting than an award of full retroactive seniority. 27a-30a and n.10.[7]

Fourth, the Courts did not rely upon the threats of an "unscrupulous employer" to use "inequitable artifices in order to limit the reach of Title VII relief," Pet., p. 16, but simply recognized that United could be expected to

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[6] None of the recent recalls of furloughed incumbents, to which McDonald refers, Pet., pp. 11-12 n.5, would have occurred under her openings proposal, which required return of all claimants before furloughees. 23a; 49a. In addition, the Court below foresaw and addressed a possible change in United's fortunes. 39a.

[7] Nothing in *Franks* or elsewhere suggests that incumbents have "diminished equities," Pet., p. 14, where, as here, they "were in no way responsible" for any discrimination, 28a, or for any alleged "obstructive and delaying tactics" by United. Pet., p. 14. Moreover, while McDonald suggests that the impact on incumbents is somehow unfairly augmented by flight attendant hiring since the suit commenced, Pet., pp. 5, 14, none have been hired since the "gargantuan" class size first became apparent. *See* "Statement of Case," p. 2, *supra*.

respond to the added $21 million annual expense of a front pay award[8] by "creating" openings to avoid paying two people for doing one person's job.

III. There is no conflict in the Circuits which requires Supreme Court resolution.

First, the appellate courts, like the Courts below, have consistently conducted evidentiary evaluations of the impact upon incumbents of proposed Title VII remedies. *E.g., Moore* v. *City of San Jose*, 615 F.2d 1265, 1272 (9th Cir. 1980); *Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977); *EEOC* v. *American Telephone & Telegraph Co.*, 556 F.2d 167, 173, 178 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

Second, as the Court below stated, "[t]he courts of appeals . . . have not read *Franks* as mandating so limited an inquiry as that urged by the class," and "have considered numerous factors, not just whether current employees would lose their jobs, in granting or reviewing a grant of seniority relief." 16a, 17a. For example, in *EEOC* v. *American Telephone & Telegraph Co.*, 556 F.2d 167, the Court "gave careful consideration to all the union's objections, and struck an appropriate balance," *id.* at 178, limiting priority rights for claimants to transfer and promotional opportunities, *id.* at 172, 174; for all other competitive purposes, claimants received precisely the same relief as here: "seniority . . . for time actually worked." 419 F.Supp. 1022, 1055 (E.D. Pa. 1976). Other Courts satisfied themselves that full retroactive seniority would cause only "minimal" impact, *Moore* v. *City of San Jose*, 615 F.2d at 1272 (12 claimants, 590 incumbents), or no "unusual harsh results." *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625, 644 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

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[8] Claimants, in seeking full pay and benefits until openings are available, 23a-24a; 49a, were hardly "willing to assume the risk" that United's economic condition would improve. Pet., pp. 15-16.

In the other cases cited by McDonald, the impact upon incumbents paled in comparison to that found here. Seniority relief was awarded to fifteen claimants in *Allen* v. *Amalgamated Transport Union, Local 788*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977), to two claimants in *Moseley* v. *Goodyear Tire & Rubber Co.*, 612 F.2d 187 (5th Cir. 1980), and *Inda* v. *United Air Lines, Inc.*, 565 F.2d 864 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); and to but one in *Spagnuolo* v. *Whirlpool Corp.*, 717 F.2d 114 (4th Cir. 1983); *Sangster* v. *United Air Lines, Inc.*, 633 F.2d 864 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); *Gurmankin* v. *Costanzo*, 556 F.2d 184 (3d Cir. 1977), *cert. denied*, 450 U.S. 923 (1981); and *Lee* v. *Macon County Bd. of Education*, 453 F.2d 1104 (5th Cir. 1971). In *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982), there were 121 openings, 479 F.Supp. 101, 115 n.15 (D. Conn. 1979), but only 73 discriminatees, 647 F.2d at 286-87,[9] and all claimants, even if granted full seniority, would be in the bottom third of the seniority list. *Id.* at 285-86.[10] *Stotts* v. *Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), *cert. granted sub nom. Firefighters Local U. No. 1784* v. *Stotts*, 462 U.S. ——, 103 S.Ct. 2451 (1983), deals principally with judicial authority to modify a consent decree, with different standards applicable, 679 F.2d at 564, no retroactive seniority was awarded, and only 2.4% of

[9] A similar situation existed in *Franks*, where extensive turnover, 424 U.S. at 799 n.20 (Powell, J., concurring and dissenting), and the fact that few discriminatees accepted job offers weighed in favor of a full seniority award, *id.* at 766 n.36 and 799 n.20; any impact in *Franks* was indeed abstract, as the Court below emphasized. 15a.

[10] Of the 512 incumbents in *Bridgeport*, 402 had seniority greater than March, 1972, the maximum retroactive seniority any claimant could receive. 647 F.2d at 285, 286. If 73 claimants accepted employment, increasing the work force to 585, the most senior would only be in the 69th seniority percentile (403 of 585).

the 1028 white employees in the affected job classifications were impacted (3 laid off, 22 downgraded, out of seniority order). City of Memphis Brief, pp. 7 n.11, 8 n.13 and Addendum B.

A clear indication that the decisions below do not signal a conflict in the Circuits or presage any retreat from *Franks*, is that the Seventh Circuit has affirmed full seniority awards when presented with different factual records, as the Court below emphasized. 16a, 19a n.8. *Air Line Stewards and Stewardesses Association, Local 550* v. *Trans World Airlines, Inc.*, 630 F.2d 1164 (7th Cir. 1980), *aff'd in part sub nom. Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982) (claimants, 3% of workforce, could be reinstated "as a result of normal attrition of workers in less than half a year," with no job loss to incumbents, 630 F.2d at 1166, 1169); *Airline Stewards and Stewardesses Association, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978) (incumbents presented no evidence of impact, which "appeared to be minimal;" "number of returning employees [3% of workforce] was not so large as to create undue problems." 573 F.2d at 962, 964, 965).

Contrary to McDonald's claim, Pet., pp. 8-9, 15, the Court below found its ruling and approach in harmony with other Circuits, 14a, 16a-17a, 19a n.8, and based on a record which demonstrated unusual adverse impact of dimensions "not generally . . . found in Title VII cases," *Franks*, 424 U.S. at 779 n.41; indeed, "of a magnitude without precedent." 87a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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